NO. 85-284

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

JANICE M. HAYES,
Petitioner,
vs.

HELEN C. CANNON, EARL EVANS, JAMES GAY III, CONNIE LARSEN, GLEN C. TAYLOR, HERMAN VAN BETTEN, CLARE WOODBURY, individually and as members of the Board of Trustees of the Clark County School District in 1976, BOARD OF TRUSTEES OF THE CLARK COUNTY SCHOOL DISTRICT, THE CLARK COUNTY SCHOOL DISTRICT, KENNY C. GUINN, CHARLES SILVESTRI, EDNA HINMAN, KENNETH ENGLEHART, JOHN T. PAUL, THERON SWAINSTON, ROBERT PETRONI, SCOTTY GLADSTONE and MERVIN IVERSON, LAMAR LEFEVRE, NEVADA DEPARTMENT OF EDUCATION, JOHN GAMBLE, HARRY SWAINSTON, AETNA LIFE & CASUALTY INSURANCE CO., SILVER STATE SCHOOLS FEDERAL CREDIT UNION, JEFFREY SOBEL, ROBERT HILLEMAN, CLARK COUNTY CLASSROOM TEACHERS ASSOCIATION, NEVADA STATE EDUCATION ASSOCIATION, NATIONAL EDUCATION ASSOCIATION, FRANK SCHRECK, and DOES I-X, inclusive,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH SUGGESTION THAT THE COURT REMAND THE ACTION PURSUANT TO 28 U.S.C. §2106

JANICE M. HAYES, ESQ.
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135
Attorney for Petitioner
Member of the Bar of
this Court.

52 pp

QUESTIONS PRESENTED

1. Whether this court's decision in Wilson v. Garcia, 471 U.S. _____, can be applied retroactively so as to impose Nevada's two year statute of limitations for personal injury when petitioner's claims under 42 U.S.C. §1983 were timely brought under the limitations statute applicable in 1979 and the limitations period was not in dispute in the lower courts and whether the holding is binding in actions brought under Sec. 1983 in state courts.

2. Whether this Court should remand this action with instructions to the Court as there was no final order from the district court pursuant to 28 U.S.C. §1291 and Rule 54(b) of the Federal Rules of Civil Procesure, there was no final order in an underlying related action, Hayes v. Honorable Justices of the Nevada Supreme Court, on which the Court of Appeals relied and whether this Court snould stay the order

in which the Court of Appeals simultaneously stated that Hayes must litigate certain claims in state court and implied that it would impose sanctions if petitioner did litigate said claims in any court, which deprives Petitioner of the right to try never-litigated claims.

3. This court should determine if it severed two appeals taken pursuant to 28 U.S.C. §1257(2) combined in one Jurisdictional Statement as Case No. 79-6152 and granted certiorari in one, Case No. 11992 from the Nevada Supreme Court, Hayes v. Gladstone and Iverson, as indicated at 101 S. Ct. LXXXIII and in docket sheets and records, and if so, on what issue, and permit petitioner to proceed on that grant of certiorari.

4. Whether the district court's Order granting summary judgment that some claims were barred by res judicata conflicts with this court's decison in Migra v. Warren City School District Board of Education, 104 S. Ct. 892. 898 (1984) and concepts of due

process and fairness in that Petitioner did not have a full or fair opportunity, or any opportunity to litigate in the state courts.

5. Whether the district court erred in refusing to rule on Petitioner's claim for declaratory judgment that Nevada Revised Statutes 41.032(2) and 41.035(1), which grant absolute immunity to all public employees and officials and preclude an award of damages in a Civil Rights action, are invalid in that they conflict with 42 U.S.C. § 1983 and this court's decision in Owen v. City of Independence, 445 U.S. 622, reh den. 100 S. Ct. 2979.

6. The constitutionality of Nevada Rule of Appellate Procedure 46(b), which prior to its 1981 amendment prohibited any litigation in proper person in civil actions before the Nevada Supreme Court, is an important question of federal law which should be, but has not been, resolved by the federal courts.

7. Whether the Court of Appeals abused its discretion in not granting a continuance on oral argument inasmuch as the Judicial Council had not ruled on a matter in a companion case and petitioner was foreclosed from presenting arguments and discussing the Complaint against District Judge Harry Claiborne and a prior panel and whether the Court should remand this case to allow Petitioner to rebut prejudicial statements made in this case founded on orders entered in a companion action.

8. Whether the district court's failure to rule on petitioner's motions to compel discovery, its denial of a motion for continuance on the summary judgment motion of the defendant School District and its failure to comply with the remand Order of the Court of Appeals were so prejudicial as to deny petitioner the right to meaningfully litigate, in that the district court allowed no discovery.

LIST OF PARTIES

IN THE SUPREME COURT OF THE UNITED STATES

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI WITH SUGGESTION THAT THE COURT REMAND THE ACTION PURSUANT TO 28 U.S.C. §2106

The petitioner Janice M. Hayes respectfully prays that this Honorable Court remand this action to the United States Court of Appeals for the Ninth Circuit, or if the court is not so disposed, Petitioner prays that a writ of certiorari issue to review the Order of the Ninth Circuit Court of Appeals entered in this proceeding on February 1, 1985, p. 1a.

OPINIONS BELOW

The judgments of the United States Court of Appeals for the Ninth Circuit and of the United States District Court for the District of Nevada were not reported.

The district court entered summary judgment for the Clark County School District, its Board of Trustees, Superintendent and employees, granted the motion of the State Department and several defendants to dismiss, and dismissed most of the claims without prejudice for want of jurisdiction, including petitioner's contract claim against the School District.

The Order of the district court setting forth its decision is at p. 19a and its Order of dismissal entered on February 8, 1983 is at p. 25a.

The Court of Appeals entered its Order affirming the distict court on February 1, 1985, p. 1a, and denied rehearing by Order entered on April 5, 1985, p. 44a.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on February 1, 1985, p. 1a, and its Order denying rehearing issued on April 5, 1985, p. 44a.

The Honorable William Rehnquist granted an extension of time of thirty days to August 3, 1985 in which to file the petition, and denied an application for a further extension submitted July 24, 1985, by Order dated July 29, 1985.

Petitioner respectfully asserts that there is no final appealable order from the district court pursuant to 28 U.S.C. §1291 and Rule 54(b) of the Federal Rules of Civil Procedure in that the district court did not adjudicate all claims notwithstanding that all claims were brought under federal statutes.

28 U.S.C. §2106 authorizes this Court to vacate or set aside the Order of the Court of Appeals and to remand the cause and direct entry of an appropriate or require further proceedings to be had.

If this court determines that there was

a final order from the district court and is not disposed to remand this action, its jurisdiction to review arises under 28 U.S.C.§ 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This case involves 42 U.S.C.§1983, The First, Fifth and Fourteenth Amendments to the United States Constitution, 28 U.S.C. §1291, Nevada Revised Statutes 41.032(2), 41.035(1), 41.0337 renumbered as 41.0339 and 391.3196 prior to its 1979 amendment and Nevada Rule of Appellate Procedure 46(b), prior to its 1981 amendment

The case also concerns whether petitioner's claims brought under 12 U.S.C. § 1751, et seq., 15 U.S.C. §1681, et seq., 29 U.S.C. §141, et seq., §151, et seq.401, et seq and 29 U.S.C. §1001 should have been tried in federal court, but the validity, interpretation or constitutionality of these statutes in not in issue and their text is not set out in the appendix.

STATEMENT OF THE CASE

The subject of this petition concerns issues of whether a state court order creates a res judicata bar and whether the district court erred in not assuming jurisdiction over petitioner's claims brought under the Civil Rights Act and other federal statutes and in refusing to enter declaratory judgments on important unresolved questions of federal law.

This action arose in a state court and would have remained there but for the policy of the Nevada Supreme Court of dismissing pro se civil appeals of right without review, pursuant to Nev. R. of App. P. 46(b) prior to its 1981 amendment.

The action began when the defendant School District brought proceedings to "dismiss" Hayes from her nearly completed 1975-76 contract of employment and subsequently voided her wholly executory 1976-77 contract.

The only charge was alleged tardiness of a few minutes in arriving at school in the early morning when no children were present.

Teachers' organizations of which Hayes was a member breached their duty of fair representation as sole bargaining agent and their contractual duty to Hayes to provide legal representation, based on an alleged "conflict of interest" that their retained attorney said was present.

After the School Board "dismissed" Hayes, another attorney hired by the associations petitioned the state trial court for review, pursuant to Nevada's Administrative Procedures Act, and upon denial of the petition, appealed to the Nevada Supreme Court in June, 1977.

In 1979, Hayes dismissed her then attorney and the Nevada Supreme Court denied her motion for leave to represent herself.

When it became apparent that the Nevada Supreme Court would dismiss without review, Hayes filed the instant action in federal court on July 9, 1979 and also filed a separate action against the Court seeking injunctive and declaratory relief on July 11, 1979. It was not feasible to combine these cases.

On the next day, July 12, 1979, the Nevada Supreme Court dismissed the appeal pursuant to Nev. R. of App. 42(b), pertaining to voluntary dismissals, and Nev. R. of App. P. 46(b), alleging that the dismissal was "at appellant's own request."

On February 8, 1983, the district court entered what it characterized as a final Order granting summary judgment on the School District's motions as to the dismissal from the 1975-76 contract. The district court held to its prior Order that dismissed all of Hayes's claims without prejudice in that the court stated they were "state law" claims.

The district court found that Hayes's claims arising from the School District's breach of the executory 1976-77 contract were state law claims and dismissed these without prejudice, also.

The district court did not rule on claims for declaratory judgments.

The Court of Appeals affirmed in all respects.

The jurisdiction of the district court was invoked under 28 U.S.C. §1331, 28 U.S.C. §1343 and 28 U.S.C. §§2201 and 2202 and under the First, Fifth and Fourteenth Amendments to the United States Constitution.and claims under 29 U.S.C. §1001, E.R.I.S.A. and 12 U.S.C. 1751 and 15 U.S.C. 1681.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE

If this court is not disposed to remand this action to the Court of Appeals, Petitioner respectfully shows the court that the petition should be granted as it contains several of the reasons delineated in Rule 17 of the Rules of the Supreme Court as bases for consideration of review and the case additionally involves questions of the application of decision of this Court.

I.

This Case Presents Questions Left Open In Wilson v. Garcia

In Wilson v. Garcia, 471 U.S. ____, 85 L Ed. 254, 105 S. Ct. 1938 (1985), this court held that all claims under 42 U.S.C. §1983 should be characterized for statute of limitations purposes as actions to recover damages for injuries to the person and that the laws governing each state's limitations period for personal injury actions would be utilized as the limitations period for Sec. 1983 actions brought in the federal court sitting in that

state.

In Wilson, supra, and in Springfield Township School District, et al. v. Knoll, 471 U.S. _____, 105 S. Ct. 2065, (1985), the statute of limitations issue was in dispute and was the subject of the petition to this court, and in each case, plaintiff gained an advantage by having the personal injury limitation period applied to his or her action.

In the instant case, Nevada's statute of limitations for personal injury is two years, whereas the statute which has been applied, N.R.S. 11.190(3)(a) provides:

> "3. Within 3 years:
>
> (a) An action upon a liability created by statute, other than a penalty or forfeiture."

The Ninth Circuit has consistently upheld the three year provision. Mason v. Schaub, 564 F. 2d 308 (9th Cir. 1977); Smith v. Cremins, 308 F. 2d. 187 (9th Cir. 1962).

Petitioner filed her federal court case on

July 9, 1979. Her causes of action against defendants arose in August, 1976 and November 1976 and continued thereafter.

Some causes of action, notably against the teachers' organizations and attorneys hired by them continued to the time of filing the federal case and others, such as the organizations' failure to provide loans, grants and legal assistance continued beyond that date.

This court did not address the issue of whether Wilson would be applied retroactively against plaintiffs who had reasonably relied on the statute of limitations operable at the time they filed suit.

Hayes was represented by counsel up to the time when she filed the instant action. It would be manifestly unfair to penalize plaintiffs, such as Hayes, who were prejudiced by the inaction of attorneys whom they are suing for malpractice.

II.

The Court Should Remand This Action With Instructions To The Court Of Appeals And Vacate Or Stay The Order That Petitioner Must Litigate Claims In State Court And Simultaneously Enjoins Her From Doing So.

Petitioner asks that this court vacate the order of the Court of Appeals and remand the action with instructions that the Court of Appeals remand the case to the district court for adjudication of all claims.

There was no final Order from the district court pursuant to 28 U.S.C. §1291 and Federal Rule of Civil Procedure 54(b) in that the district court did not adjudicate Hayes's claims against all defendants under 42 U.S.C.§ 1983, as it was instructed to do by a order of a prior panel of the Court of Appeals, the district court declined to rule on the claim for a declaratory judgment that N.R.S. 41.032(2) and N.R.S. 41.035(1) are invalid, the court's finding that Hayes "had a better remedy in damages provided no relief; the district court did not adjudicate Hayes's claims against the teachers' organizations and AETNA, which were brought under the Employees Retirement Income

Act and those against the SILVER STATE TEACHERS FEDERAL CREDIT UNION, brought under 12 U.S.C. §1751, et seq., 15 U.S.C. §1681, et seq. and E.R.I.S.A., 29 U.S.C.§1001, et seq., notwithstanding that the federal court has exclusive jurisdiction over E.R.I.S.A. claims; the district court did not assume jurisdiction over Hayes's claims for breach of the duty of fair representation brought under the Fair Labor Standards Act and Labor-Management Act; and the district court did not rule on the federal question whether litigants, such as Hayes who was a law student in 1979 with no income, who were precluded from litigating in state courts pursuant to Nev. R. of App. P. 46(b), should be granted a forum in the federal courts.

AETNA was the underwriter for the insurance benefit programs provided to employees of the School District and to terminated employees under conversion plans. AETNA has a duty to provide summaries of the plans and to advise school district employees of their

rights regarding conversion. The conversion rates were discriminatory as to women. Hayes contends that the School District and Aetna acted in concert to terminate older employees in order to realize a better profit on the health and accident and life insurance programs. The school district paid the same rate for each employee, regardless of age, sex, physical impairments and health.

HAYES avers these entities acted together to keep the names of terminated employees on the list of insurance participants, and AETNA profited because it received premiums for non-existent employees who would never file a claim and whose survivors would never file claims for death benefits.

The district court declined to rule on Hayes's claim for a declaratory judgment to determine the rights of AETNA and HAYES. AETNA contended that it paid claims submitted by Hayes for fourteen months before it allegedly discovered that she was not their insured and threatened to sue Hayes

for repayment. Hayes alleges that AETNA owes her money for claims incurred as a result of an accident which occured during the time in which it is undisputed that Hayes was an insured.

The district court failed to comply with the Court of Appeals' Order in Case No. 82-5403, an earlier appeal, which dismissed the appeal for want of a final order and indicated that the district court should review all claims a 42 U.S.C. §1983 standard and cited Scott v. Eversole Mortuary, 522 F 2d 1110, 522 f. 2d 1110. See p. 25a, and also 26a and 27a.

On remand, the district court entered its order that all counsel should file reports giving the court directions what to do and which actions should be taken next. See 26a, 27a and 28a.

The court did not hold any further proceedings and did not allow Hayes to amend her Complaint, previously amended as of right before service, and issued a brief minute Order dismissing all claims.

Similarly, there was no final Order in an underlying case, Hayes v. Honorable Justices of the Nevada Supreme Court, over which the same judge, Roger Foley, presided. Judge Foley entered Minute Orders, not signed by the judge, which dismissed the Complaint without any findings or bases for its reason.

-In the instant case, there was no other basis than 28 U.S.C.§1291 for review. There was no request for or grant of a writ of certiorari by the Court of Appeals. There was no certified question pursuant to 28 U.S.C. § 1292, nor any certification as required by Fed. R. of Civ. P. 54(b), and the case does a question which would bring it within the collateral orders doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 641, 69 S. Ct. 1221.

Petitioner requests that this Court vacate or stay the Order of the Court of Appeals pertaining to litigation in the state courts.

The Court of Appels erred in concluding

or implying that the district court dismissed Hayes's contract claim against the school district, see p. 6a. The district court dismissed the "dismissal" claim on a res judicata theory but declined to exercise jurisdiction over the "contract" claim.

The Court of Appeals ruled that Hayes must litigate the breach of contract, libel, E.R.I.S.A. claims and governmental employees' immunity claims in state court, but indicated "We further emphasize that Hayes cannot litigate such claims ('dismissal" in <u>any</u> subsequent action, in state or federal court," p. 12a, (emphas in original), and impliedly threatened to impose sanctions if Hayes did attempt to raise these never-litigated claims in state court. See p. 16a, concluding paragraph, in which the Court admonished, "We caution, however, that the impositions of sanctions may well be appropriate if Hayes persists in raising similar claims in subsequent federal actions."

The court has, therefore, placed

Hayes in an untenable position, as well as making erroneous implications that reflect adversely on her personally and professionally.

III.

THIS COURT SHOULD DETERMINE WHETHER IT GRANTED CERTIORARI IN AN APPEAL TAKEN PURSUANT TO 28 U.S.C. §1257(2).

In 1979, Hayes took an appeal to this court from an Order of the Nevada Supreme Court's refusal to review her pro se civil appeal of a state trial court's order denying her motion for an injunction enjoining the Attorney General from representing the defendants.

Scotty Gladstone and Mervin Iverson were the defendants and they are defendants herein. The Gladstone case is still pending before the Nevada Supreme Court and the issues raised therein are those raised in the earlier appeal to this court.

Hayes combined the Gladstone case and an unrelated case, Valley Bank of Nevada v. Hayes, sub nom, Hayes v. Valley Bank into one Jurisdictional Statement, as they had a

common federal question, i.e., whether the Nevada Supreme Court could constitutionally dismiss and refuse to review appeals, petitions for writs and interlocutory orders for the sole reason that a person was not represented by an attorney as required by Nev. R. of App. P. 46(b).

In addition, the issues of the validity of N.R.S. 41.032(2) and N.R.S. 41.035(1), granting absolute immunity to public employees and precluding an award of punitive damages in a Civil Rights action, and the constitutionality of N.R.S. 41.0337, renumbered as 41.0339, were fairly included in the Jurisdictional Statement.

Then N.R.S. 41.0337 provides that the Attorney General could only represented persons who (1) were public employees or officials; (2) requested representation either through their departments heads or directly to the Attorney General if they were elected officials or heads of an agency; (3) acted in good faith (4) within the scope of their

authority.

Hayes contends that Gladstone and Iverson met none of these requirements and that they were merely volunteer arbitrators, paid by Hayes and the School District equally, whose advisory opinion was not binding on anyone and had no force and effect of itself.

The statute permitted the Attorney General to predetermine all of these ultimate issues.

There are indications that this Court severed the Gladstone case and granted certiorari. The Valley Bank case was dismissed for want of a properly presented federal question.

101 S. Ct. LXXXIII has the following notation:

> "Nev. 11992--app. dis. cert
> 100 S. Ct. 1826; reh den
> 100 S. Ct. 3052."

The cites given are for the Valley Bank case, No. 11631 in the nevada Supreme Court.

The Gladstone case is listed at 448 U.S. 908, but not at 446 U.S. 902.

In addition, the docket sheet shows only

The Valley Bank case in Case No. 79-6152 in this court and incorrectly indicates that Valley Bank filed a motion to dismiss the appeal and lists Larry Struve as counsel, whereas only Gladstone and Iverson filed a motion to dismiss and they were represented by Struve, a Deputy Attorney General of Nevada. Mr. Struve could not represent Valley Bank, a private party.

Hayes has filed motions for an order directing the clerk to furnish records but said motions have been returned to her without presentation to Justice Rehnquist.

If certiorari were granted, Hayes was never notified.

Petitioner respectfully suggests that she should be allowed to proceed on the grant of certiorari, as the case involves questions still at issue.

IV.

The District Court's Order That Hayes's "Dismissal" Claims Were Barred By Res Judicata Was Error

The district court's ruling that claims

pertaining to her "dismissal" were barred by the principle of res judicata conflicts with this court's decision in Migra v. Warren v. Warren City School District Board of Education 10r S. Ct. 892, 898 (1984) and is internally inconsistent in that Hayes's "contract" and libel claims against the School District and its employees, arose from the same nucleus of operative facts as the "dismissal" claim.

The "contract" claim would not have arisen but for the "dismissal" action. The School District voided Hayes's wholly executory contract for the 1976-77 school year based solely on the basis of the "dismissal." Neither the "dismissal" nor the "contract breach" were authorized by Nevada law in 1976.

The basis of Hayes's civil rights claims arise under a Owen analysis, As in Owen, supra, Hayes alleges that the School District libeled and slandered her in the manner in which they terminated her employment after thirteen years and after she had already signed a contract for the following year.

Hayes did not have a "full and fair opportunity to litigate her claims" as is required by Migra, in that the advisory committee which heard the school district's claims did not have jurisdiction under then N.R.S. 391.3196 as Hayes had already signed a contract for the next year; the charge of "tardiness" was insufficient to warrant "dismissal"; the principal's memos alleging tardiness were incorrectly received as substantive evidence, whereas the memos stated on their face that a teacher did not admit the statements in a memo by signing it; Hayes was obliged to represent herself when the attorney retained by the teachers' associations failed to appear; the Chairman, Gladstone, was prejudiced against Hayes and alleged in his Majority Report that Hayes had supposedly decieved the panel while having the advice of counsel and that Hayes did not write the Opening Brief herself, both of which allegations were untrue.

Hayes fared no better in the state courts. The trial court proceedings were limited, at

the request of Hayes's then attorney, to oral argument of counsel; the transcript therof was never filed in any court; Hayes was not present and does not know what issues were argued and Hayes has been denied access to a copy of the transcript.

After Hayes fired her then attorney, several months before oral argument, the Nevada denied her motion for leave to appear in proper person and after Hayes had filed the instant action and Hayes v. Justices in the federal court, the Nevada Supreme Court entered a self-serving Order alleging that the appeal was dismissed pursuant to Nev. R.of App. 46(b), and "at appellant's own request,"

Hayes had not consented to any dismissal except one without prejudice to her right to file the same action in federal court and one which would not be an affirmation of the trial court's order. See pp. 31a, , excerpts from the Complaint in the Justices action.

There is no docket record that reflects that Hayes's then attorney, defendant SOBEL, consented to any dismissal on Hayes's behalf.

nor did the Nevada Supreme Court Justices ever raise this defense.

Petitioner, therefore, respectfully suggests that this action should be remanded for trial in the district court on all claims.

V.

The Validity of N.R.S. 41.032(2) And N.R.S. 41.035(1) Present An Important Federal Question Which Should Have Resolved By The District Court

The district court and Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In addition to refusing to rule on Hayes's claims brought under the Civil Rights Act and federal statutes and on her claims for declaratory judgment as to AETNA and on the issues presented by Nev. R. of App. P. 46(b), the district court also evaded ruling on Hayes's claims that N.R.S. 41.032(2) and N.R.S. 41.035(1) are invalid.

The Nevada Supreme Court and Nevada trial courts have also evaded ruling on

these statutes, notwithstanding this Court's decision in Owen, supra. that an award of punitive damages is an integral and necessary measure to fully effectuate the intent of Congress in enacting 42 U.S.C. §1983.

The lower court's refusal to address the validity of these immunity statutes had the effect of upholding the statutes without any proceedings or briefing.

Nevada Revised Statute 41.032 provided in relevant part:

> "No action may be brought under N.R.S. 41.031 or against any officer or employee of the state or any of its agencies or political subdivisions which is:
>
> . . .
>
> 2. Based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of any of its agencies or political subdivisions or any officer or employee of any of these, whether or not the discretion involved is abused."

This Court found in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. that school board members could be held individually liable and sued under sec. 1983 if they knew

or should have known that their actions would violate the cconstitutional rights of another or if they acted with malicious in-intent.

In the instant case, both of these requirement apply to the School District and its employees, but Hayes did not have the opportunity to litigate this issue.

The district court's statement and the Court of Appeal's affirmation that Hayes had a "better remedy in damages" could not aid Hayes. The "remedy" suggested is illusory and empty in that Hayes could not collect damages unless (1) the court allowed her to try her claims, and (2) NRS 41.032(2) and NRS 41.035(1) were overturned.

N.R.S. 41.035(1) provides in relevant part as amended by the 1977 legislature:

> 1. An award of damages for damages for an action sounding in tort brought under NRS 41.031 oe against a present or former officer or employee of the state or any political subdivision . . . arising out of an act or

> ommission within the scope of his public duties or employment may not exceed the sum of $35,000 . . . An award may not include any amount as exemplary or punitive damages.

28 U.S.C. §2201 provides that a federal court may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

VI

The Constitutionality of Nev. R. Of App. P. 46(b) Is Important Question Of Federal Law Which Should Be Resolved By The Lower Courts

The lower courts declined to rule on the questions pertaining to Nev. R. of App. 46(b). Hayes did state in her Amended Complaint of Right filed in proper person in 1980 that she did not intend to litigate the Rule 46(b) question inasmuch as it was pending before the same judge in a complaint for declaratory and injunctive relief, Hayes v. Justices, etc., Case No. CV-LV-79-142, RDF.

Hayes, however, should not be held to an optimistic statement five years ago. The court

erred in refusing to allow Hayes to amend her Complaint in the instant action.

The district court failed to rule on the related issue that the issue of whether litigants from the Nevada state courts should be permitted to litigate in the federal court, which is, in itself, a federal question.

The district court granted defendants motion to dismiss in the Justices case by Minute Orders not signed by the judge and denied a motion for findings of fact and conclusions of law. Hayes had notified Judge Foley of the action filed pursuant to 28 U.S.C. §1257(2). See pp. 34a, 35a, 36a, 37a and 38a.

This court dismissed the appeal in Hayes v. Board of Trustees of the Clark County School District, 444 U.S. 1009, 444 U.S.1061 reh den 445 U.S. 973, and taking the papers as a petition for certiorari, denied certiorari. The appeal was dismissed for want of jurisdiction and may have been occasioned by the School District's argument that the case (arising from a state court order) should

be tried in the federal district court.

At the same time, the defendants Justices argued in the federal district court that the lower court had no jurisdiction.

When the district court case reached the Court of Appeals, Case No. 80-5311, that court concluded, sua sponte, that Hayes did not have standing in that she allegedly consented to the dismissal of the School District case by the Nevada Supreme Court. See p. 39a.

The action against the Justices also sought to enjoin them from dismissing civil appeals in the Gladstone case, on appeal from a denial of an injunction, and the Valley Bank action.

Hayes filed a federal court case in Valley Bank prior to the dismissal of the Nevada Supreme Court action pursuant to Nev. R. of App. P. 46(b).

Judge Harry Claiborne found that the Valley Bank case was dismissed pursuant ot Rule 46(b), but did not decide the issue of whether said dismissal was constitutional.

The Court of Appeals panel which heard the Valley Bank appeal along with the Justices case. however. sua sponte, and without giving any reason therefor, overturned Judge Claiborne's finding of fact, and ruled that Hayes did not have standing. See Judge Claiborne's Order,

The panel, Judges Browning, Tang and Farris, also erroneously concluded that Hayes did not take appeals pursuant to 28 U.S.C. §1257(2) and issued orders that Hayes could not seek review of that Order.

This court denied the petition for certiorari in Hayes v. Justices of the Nevada Supreme Court, Case No. 82-1419, 459 U.S. 938, 74 L. Ed 2d 194, 76 L Ed 348 (1983).

The implementation of Nev. R. of Civ. P. 46(b) denied Hayes and other pro se litigants of their rights of access to the courts and due process, and deprived them of liberty and property interests.

The federal courts should assume jurisdiction over this issue and enter a decision.

VII

The Court of Appeals Erred In Not Granting A Continuance And Hayes Is Entitled To A Hearing And Correction OF Prejudicial Statements

Petitioner respectfully avers that the Court of Appeals' refusal to grant a continuance on hearing of oral argument was erroneous and seriously imparied her right to present her case.

Petitioner had advised the panel that a complaint that the panel which heard Hayes v. Justices of the Nevada Supreme Court, Case No. CA9 80-5311, had acted in a manner detrimental to the effective administration of the courts was pending before the Judicial Council and Petitioner was precluded from fully discussing the merits of her appeal and in arguing that the Justices panel had been prejudiced against her because of the false statement made in dicta by District Judge Harry Claiborne that Hayes had allegedly not complied with an order that the Amended Complaint of Right had to be served by a time certain.

Hayes was appearing in proper person then and she had timely delivered sufficient copies of the Summons and Complaint to the U.S Marshal with instructions for service.

There was no Local Rule setting any time limit for service, nor had Fed. R. of App. P. (j) been promulgated.

The original Complaint had not been served; amendment was made prior to service. therefore personal service was required.

Judge Claiborne also branded Hayes's motion for sanctions, one of only two substantive motions she made in three years, as "bordering on vexatious" and refused to rule on it based only on his misconception that she had not complied with her order regarding service.

Petitioner alleges that the panel which heard the Justices case was thereby prejudiced and they added some superfluous Comments of their own, which in turn, influenced the panel which heard the instant action.

After the request for a continuance was

denied, Petitioner did not have an opportunity to explain these matters before the present panel, nor could she seek review of the other panel's misconceptions as explained on page 35 hereein.

A petition for review was filed in May, 1984 with the Judicial Council, which did not enter its order denying review and a hearing until more than a year later in June, 1985.

The Council indicated that an attorney must seek appellate review of prejudicial statements, even those made in dicta.

Petitioner, therefore, appeals from the statements made on p. 18a, which create the false impression Hayes had done something which would warrant consideration of imposing sanctions or that she had raised or litigated the same claims several times.

In fact, as Hayes has demonstrated and the district court found, the majority of her claims had not been raised or litigated in any action. Only the defendant School Board and

had previously been named as defendants in state court and none were named in any federal action.

VIII

The District Court's Refusal To Allow Any Discovery And To Grant A Continuance On The School District's Motion For Summary Judgment Were So Prejudicial As To Deny Petitioner Access To The Court

In the three years this action was pursued in district court, the district judge deprived petitioner of the right to obtain any discovery, not even the state court transcript.

Defendants filed motions for protective orders upon receipt of the first discovery request. The court did not rule on petitioners' motions to compel discovery nor on defendants' motions, which had the effect of granting the protective orders.

Only the School District defendants moved for summary judgment. The court granted the other defendants' motions to dismiss, without hearing.

The court denied a motion for a continuance on argument on the summary judgment.

After the Court of Appeals dismissed the

subsequent appeal, the district judge ordered all parties to file papers telling him what to do next. See pp25a-, 26a, 27a and 28a.

The court held no further proceedings on remand, did not rule on Hayes's renewed motions for a ruling on two-year old motions to compel discovery, p. 28a, Docket NR 164 and 178 docket entry dated 1-5-83, and issued an Order dismissing all claims., p. 28a, 29a.

There is seldom a case where the court justifiably orders that no discovery be had, Investment Properties Int'l Ltd. v. Los Ltd., 459 F. 2d 705.

CONCLUSION

For the reasons set forth, Petitioner respectfully suggests that this Court should vacate the Order of the Ninth Circuit Court of Appeals and remand this action with instructions, or that the Court review this action on a writ of certiorari.

Petitioner additionally respectfully requests that the Court ascertain if it had already granted certiorari in 1980, unbeknownst

to Hayes, in Hayes v. Gladstone and Iverson, part of Case No. 79-6152 in this court, 446 U.S. 902, 448 U.S. 908, but see 101 S. Ct. LXXXIII, which excludes the other case in 79-6152.

There are important questions of constitutionality of state statutes which have evaded review. Several of the lower court's rulings conflict with decision of this court in Migra, supra, and in Owen v. City of Independence, supra, and its progeny.

This case presents questions left open in Wilson v. Garcia, supra., which should be addressed as the lower courts ordered that Petitioner must litigate her timely brought claims under 42 U.S.C. §1983 and some claims might now be time-barred under Wilson.

Respectfully submitted,

JANICE M. HAYES, ESQ.
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135
Petitioner
Attorney for Petitioner